

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF SAINT THOMAS/ST. JOHN

FLORA NICHOLAS and PAUL
GAYTER in their own right and as next
friend of S.G.,

Plaintiffs,

Civ. No. 2001/147MR

v.

WYNDHAM INTERNATIONAL, INC.,
WYNDHAM MANAGEMENT CORP., SUGAR
BAY CLUB AND RESORT, CORP.,
RICK BLYTH and BRIAN HORNBY,

Defendants.

**ORDER REGARDING THE WYNDHAM DEFENDANTS'
MOTION TO COMPEL IME**

THIS MATTER came for consideration on the Wyndham defendants' motion to compel the IME of plaintiffs and the minor Andrew Gayter. Plaintiffs filed a consolidated opposition and the Wyndham defendants replied to such opposition. As is evident from the latter pleadings, the parties reached agreement on all issues except the IME of Andrew Gayter. By Order of the Court dated June 6, 2003, the Court memorialized the parties' agreement and reserved ruling on the propriety of the IME of Andrew Gayter.

Thus, the sole issue to be considered herein is whether the Court should compel the mental examination of Andrew Gayter.¹

DISCUSSION

Rule 35(a) of the Federal Rules of Civil Procedure authorizes a court to order a mental or

¹Defendants seek to include Andrew in a two hour family session on Wednesday, July 16, 2003, from 4:30 P.M. to 6:30 P.M.

physical examination of a party where such condition is in controversy.² *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964) instructs that, a court faced with deciding whether to compel an IME must first determine “whether the party requesting a mental or physical examination has adequately demonstrated the existence of [Rule 35]’s “in controversy” and “good cause” requirements.” Such requirements are not met by conclusory allegations but “require an affirmative showing” by the movant that each condition is genuinely in controversy and that good cause exists for ordering each particular examination. *Id.*

Plaintiffs oppose Andrew’s IME on several grounds. They argue that he is not a party to the action; that they do not allege any injuries on his behalf nor do they seek damages; and that their expert’s reference to Andrew do not place his mental health in controversy.

Rule 35 was amended in 1970 to eliminate the restriction that a physical or mental examination could only be performed upon a party. *See* NOTES OF ADVISORY COMMITTEE ON RULES, 28 U.S.C.A. Rule 35(a), 1970 Amendment. (“It is desirable to extend the rule to provide for an order against the party for examination of a person in his custody or under his legal control”). *In re Certain Asbestos Cases*, 112 F.R.D. 427, (N.D.Tex. 1996). Andrew Gayter

²

Order for Examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party’s custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

is a minor residing with plaintiffs, his parents; thus, he is within their legal custody and control.

The plaintiffs in this case have involved Andrew Gayter in this litigation. Andrew was a named plaintiff in the initial complaint before being removed, was, allegedly, present during the claimed instances of abuse, and has been deposed by the defendants. Thus, discovery related to him is relevant to the subject matter in this pending litigation.

Moreover, plaintiffs have placed Andrew's mental condition "in controversy". Plaintiffs generally allege that the molestation of Andrew's minor sister has had a negative effect on the family, in particular, her brother Andrew. In his "Summary of Psychiatric Assessment", plaintiffs' expert, Dr. Bruce D. Perry states that the alleged sexual abuse of S.G.,

"magnified preexisting fault lines in the family. S.G. had a rivalry with her brother that predated Bryan Hornbys abuse of her; however, as a result of the abuse, S.G. has grown increasingly hostile toward her brother. These events have caused profound problems in the family and magnified common family issues into difficult to manage obstacles."

Plaintiffs' expert Dr. Gil, also makes several references to Andrew in her "Declaration" and claims that any treatment by her would, necessarily, include Andrew, in a "joint session". Thus, plaintiffs' have placed Andrew's individual and family-related mental condition in controversy.

There is good cause to compel Andrew to submit to an IME. Good cause requires a showing that the examination could adduce specific facts relevant to the cause of action and is necessary to the defendants' case. *Womack v. Stevens Transport, Inc.*, 205 F.R.D. 445, 447 (E.D.Pa. 2001). The Wyndham defendants assert that production of Andrew will allow them to explore the claims involving Andrew made by plaintiffs' experts. The promulgators of Rule 35 assumed that cross-examination is an insufficient test of the truth, and as a result, independent

examinations were prescribed. *See, Tomlin v. Holecek*, 150 F.R.D. 628, 632 (D.Minn. 1993).

CONCLUSION

For the foregoing reasons, plaintiffs have placed Andrew's mental condition in controversy in this matter by alluding to his part in family problems spawned by S.G.'s claimed sexual abuse. Further, good cause exists for his IME in that defendants' experts are entitled to explore plaintiffs' experts findings regarding Andrew's involvement in the family crisis and there is no other means of assessing his current mental condition.

Accordingly, it is hereby ORDERED AS FOLLOWS:

1. that the Wyndham defendants' motion for an Order compelling Andrew Gayter to submit to an IME is GRANTED.
2. That plaintiffs Flora Nicholas and Paul Gayter shall produce their minor son Andrew G. for participation in the family session examination with Dr. Marilyn B. Benoit on Wednesday, July 16, 2003 from 4:30 P.M. to 6:30 P.M.

Alternatively, at the discretion of plaintiffs upon timely notice to defendant, they may opt not to produce Andrew G. at such time in which case plaintiffs shall be barred at trial from presenting any testimony, evidence or expert opinion that refers in any way to S.G.'s relationship with Andrew G. and any damages to S.G., the parent plaintiffs or Andrew G. arising from such relationship or from any other effect the subject incident may have had on Andrew G. (e.g. as noted at Page 2, No. 9 of Dr. Perry's Report: Exhibit "A" to Hornby's motion, and Dr. Gil's notes: Exhibit "B" to Hornby's motion).

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Date: June 9, 2003

ENTER:

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

A T T E S T:

Wilfredo F. Morales, Clerk of Court

by: _____

Deputy Clerk

cc: Daryl Barnes, Esq./ Britain H. Bryant, Esq. (FAX 773-5427)
John Zebedee, Esq. (FAX 775-3300)
Douglas Beach, Esq. (FAX 776-8044)